Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF OF THE UNITED STATES

October Term 2005

LORENA ACKERMAN, et. al.
Petitioners,

vs.

BARBARA MURPHY, et. al.
Respondents.

On Petition For Writ of Certiorari
To the Supreme Court of the State of California
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California is one of six states enumerated in 28 U.S.C.A. 1360, et seq., commonly referred to as Public Law 280, in which the courts of those states were mandated by Congress to exercise jurisdiction in suits between Indians or to which Indians may be parties. Congress subsequently guaranteed protection of certain civil rights to individual members of tribes against abuses by tribal officials and tribal governments. The question presented is:

Does Public Law 280 (28 U.S.C.A. Section 1360 et seq.) confer jurisdiction on Courts of California in suits by Indians against officials of their own Tribe to enforce their own Tribal Constitution and the Indian Civil Rights Act, 25 U.S.C.A. Section 1302 et seq.?

LORENA ACKERMAN, EDWARD "BOB" FOREMAN, LEON FOREMAN, SR., YVONNE WILSON, LYNETTE COOPER, TRACY LEROY, CHERYL FULLERTON, TANYA FOREMAN, ANTHONY GANNETT,

Petitioners,

vs.

BARBARA MURPHY, Chairperson, individually and in her official capacity as Chairperson of the Redding Rancheria, a Federally recognized Indian Tribe, HOPE WILKES, individually, and in her official capacity as Vice-chairperson of the Redding Rancheria, JACK POTTER, individually and in his official capacity as Treasurer of the Redding Rancheria, VIRGIL BAKER, Sr., individually and in his official capacity as an alternate member of the Redding Rancheria Tribal Council, PATTY SPAULDING, individually, and in her official capacity as an alternate Member of the Redding Rancheria Tribal Council,

Respondents.

Opinions below....1
Jurisdiction....1
Constitutional and statutory provisions involved....1
Reasons for granting the Petition....8
DISCUSSION....9
THE CALIFORNIA COURT ERRED ON AN IMPORTANT QUESTION OF LAW BY ITS FINDING THAT PL-280 DOES NOT REQUIRE THE ENFORCEMENT OF A TRIBAL CONSTITUTION AND A FEDERAL STATUTE ENSURING BASIC CONSTITUTIONAL RIGHTS TO INDIVIDUAL INDIANS IN CALIFORNIA TRIBES....11
THE CALIFORNIA COURT OF APPEAL ERRED ON AN IMPORTANT QUESTION OF LAW BY ITS FINDING THAT EX PARTE YOUNG DOES NOT APPLY TO TRIBAL OFFICIALS WHO ACT IN EXCESS OF THEIR AUTHORITY IN VIOLATION OF THEIR OWN CONSTITUTION AND FEDERAL LAW....15
CONCLUSION....21

Appendix A.....Opinion of the Court of Appeal below.....1a
Appendix B.....Judgment of Dismissal by Trial Court....14a.
Appendix C.....Ruling by Trial Court....16a.
Appendix D.....California Supreme Court; Pet. DENIED.19a

Appendix E.....Petition for Mandate, Trial Court, raising Federal issues.....20
Appendix F.....Ft. Peck Court of Appeals; opinion re limits on sovereign immunity from tribal jurisdiction not subject to PL 280.....43

TABLE OF AUTHORITIES

CASES

ARIZONA PUB. SERVICE CO.
v. ASPAAS, 77 F.3d 1128 (9th Cir.1996)..
BROWN v. TOPEKA BRD. OF EDUCATION,
347 U.S. 483 (1954).....
BRYAN v. ITASCA COUNTY,
426 U.S. 373 (1976).....
BURLINGTON N.R.R. v. BLACKFEET TRIBE,
924 F.2D 899 (9th Cir. 1991).....
DAWAVENDEWA v. SALT RIVER

PROJECT, 276 F.3d 1150 (9th Cir. 2002)..
EX PARTE YOUNG, 209 U.S. 123 (1908)
FT. PECK SIOUX COUNCIL v.
FT. PECK TRIBES, Appeal No. 370...
Appendix E (FT. PECK APP. 2003)
MARBURY v. MADISON, 5 U.S.
(1Cranch) 137 (1803)....
TERRY-CARPENTER, et al. v. LAS
VEGAS PAIUTE TRIBE,
29 Indian Law Rptr. 6041 (Ct App. LV Paiute
Tribe, 2002).....
THOMPSON v. CHEYENNE RIVER SIOUX
TRIBE BOARD OF POLICE COMMISSIONERS,
23 Indian Law Rptr. 6045.....
TURNER v. MARTIRE, 82 Cal. App. 4th 1042,
97 Cal. Rptr. 2d 863, 99 Cal. Rptr. 2d 587
(Cal. App. 2000).....
UNITED STATES v. WADENA, 152 F.3d 831
(8th Cir. 1998).....

STATUTES AND CONSTITUTIONS

PUBLIC LAW 280,
28 U.S.C.A. Section 1360 et seq.....
INDIAN CIVIL RIGHTS ACT,
25 U.S.C.A. Section 1302 et seq.....
BILL OF RIGHTS, REDDING RANCHERIA
CONSTITUTION, ART. III.....

MISCELLANEOUS

L. Scott Gould, TOUGH LOVE FOR TRIBES:
RETHINKING SOVEREIGNTY AFTER
ATKINSON AND HICKS,
37:3 New England L. Rev.669 (2003).....

OPINIONS BELOW

The Opinion of the California Court of Appeals, District 3, (App.A, infra, 1a-13a) is reported at 121 Cal.App. 4th 946, 17 Cal. Rptr. 3d 517. The Judgment of Dismissal by the Superior Court of the State of California in and for Shasta County, (App.B, infra, 14a-15a, is unreported. The Ruling of the Superior Court (App.C, infra, 16a-19a is unreported. The Denial of Review by the Supreme Court of California, (App.D, infra, 19a) is unreported.

JURISDICTION

The Denial of a Petition for Review by the Supreme Court of California was filed on December 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. 28 U.S.C.A. 1360 et seq. (commonly referred to as Public Law 280) states:

28 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to

which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made

pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

2. 25 U.S.C.A. 1302, et seq. (Commonly referred to as the Indian Civil Rights Act) states:

No Indian Tribe in exercising powers of self-government shall-

(1) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a

witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesss against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in noevent impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000.00, or both;

(8) deny to any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

3. The Rights of the Members of the Redding Rancheria are set forth in the Constitution of the Redding Rancheria, Article III, which states:

The rights of the Redding Rancheria members are those which are guaranteed by the Indian Civil Rights Act of

1968. The Tribal Council in exercising powers of self-government shall not:

a) Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assembly (sic) and to petition for a redress of grievances;

b) Take any private property for a public use without just compensation;

c) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

d) Violate the rights of the people to be secure in their homes.

Any and all other rights specified in the Indian Civil Rights Act, but not listed in this Constitution, shall be in effect when necessary and appropriate.

STATEMENT OF THE CASE

The Tribe's Enrollment Procedures Act (Act) had been adopted in 1987. Pursuant to the Tribe's Constitution, adopted that same year members of the Tribe consisted of all seventeen (17) original distributees listed on the plan of distribution of the Redding Rancheria, dated Oct. 8th and all lineal descendants of the seventeen (17) original distributees. Id. at par. 16.

Petitioners, Foreman family members all had been

accepted as grandchildren or great-grandchildren of an original distributee, Virginia Timmons.

In the summer of 2002, the Foreman family lineage was challenged, the Foreman family was required to establish that their grandmother had a child, and to establish that basic fact before the very tribal officials who were belatedly challenging that lineage. [A theory of those Tribal officials attempting disenrollment that the grandmother was instead a great-aunt, covering up a supposed ancient family scandal involving the purported pregnancy and delivery at age eleven by their grandmother's and great-grandmother's minor sister who had, by Foreman family memory and history, died childless, was required to be disproved, nearly a century after the birth of the grandmother.]

Foreman family members filed a petition for a writ of mandate in the trial court against the Council members, who would personally benefit from the reduced number of members sharing benefits of Tribal membership.

The Council members filed a motion to quash service of summons, motion to dismiss, and demurrer to the petition. Id. at par. 29.

The trial court granted the Council members' motion to quash finding that the Council members made a sufficient showing of entitlement to sovereign immunity (id. at par. 30) and finding that **Bryan v. Itasca County,** 426 U.S. 373, (1976) "...makes clear that the purpose of Public Law 280 was not to resolve disputes that affect the tribe and its ability to govern itself." Id at par. 32.

FEDERAL QUESTION RAISED

The Petition for a Writ of Mandate, (App. E) 20a-42a, *infra*, raised on its face the Federal question of the application of Public Law 280 to vindicate the Federally guaranteed rights of individual Indians pursuant to the Indian Civil Rights Act, 25 U.S.C.A. Section 1302 et seq., in enforcing those rights in the courts of those states, including the State of California, enumerated in 28 U.S.C.A. Section 1360 et. seq.

The trial judge considered the Petition and its Memorandum (App E, 20a-42*infra*) and ruled that the Tribal officials were protected by sovereign immunity. (App. C, 16a -18a, *infra*). The trial judge then dismissed the Petition by written Order. (App.B.14a-15a, infra)

The Court of Appeal of the State of California, Third Appellate District, affirmed the dismissal in a reported decision, (App. A. 1a-13a) rejecting Petitioners argument that the Federal Statute, Public Law 280, mandated jurisdiction to California Courts for such claims by individual Tribal members against Tribal officials. That Court reported that Petitioner, Ackerman, argued that "...the tribe's sovereign immunity is subject to the exception enunciated in **Ex Parte Young**, 209 U.S. 123 (1908) and reports that Ackerman "...seeks to enforce both the ICRA [Indian Civil Rights Act] and the tribe's constitution. App. 10a-12a.

The California Supreme Court denied Review in an unreported Order.

REASONS FOR GRANTING THE PETITION

The decision of the courts below, if unresolved, will create a vacuum which deprives injured Indians of any relief against Tribal officials, acting beyond the scope of their authority in violation of federal law and their own Tribal Constitutions.

Turner v. Martire, 82 Cal.App. 4th 1042, 97 Cal. Rptr.2d 863, 99 Cal.Rptr.2d 587, (Cal. App. 4th 2000) properly held that:

> Where an officer of a sovereign acts beyond his or her delegated authority, his or her actions "are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden.[internal citation omitted] Therefore, immunity does not attach to such conduct. Id. at par. 67

Inexplicably, the trial court misapplied and misread **Turner** to deny Petitioners of the **Ex Parte Young** exception to the sovereign immunity of governmental officials. App, *infra* at 18a.

Another Department of the California Court of Appeal did not deprive the plaintiffs in that action of a

remedy. The reasoning set forth in **Turner,** if properly applied, would have compelled a different conclusion in the instant action, in which the Third Appellate District ruled in an inconsistent manner. Defendants in **Turner** did not meet the first prong of the test set forth therein of having "policymaking functions" within or on behalf of the Tribe, so that Court found it unnecessary, *in that case*, to consider the second prong for tribal official immunity, i.e. that the official must have acted within the scope of his or her official authority.

DISCUSSION

This is not another in a chain of cases in which abused Petitioners complain to the Court that there is not a forum for their complaint.

Congress gave jurisdiction to the courts of California for suits between Indians. That grant of authority was not affected by the restriction, *in Federal Courts,* to habeas corpus as the sole relief available *in Federal Courts*.

Were it otherwise, Indian tribes in the State of California and in the other five states subject to PL-280, would be able to institute much mischief and unconstitutional abuses for which habeas relief is inadequate or unavailable without necessary and appropriate remedy from this or any court.

The Tribal Council members' and the California Court's theory of sovereign immunity is unsupported by the authority they cite and unsupportable by other authority.

There is a remedy when the Tribal Council does not comply with the Tribe's own Constitution or with the Indian Civil Rights Act–a Federal statute adopted as Tribal law by the Tribal Constitution.

The Constitution of the Redding Rancheria has an impressive Bill of Rights, set forth in Article III of that Constitution, which adopts as Tribal Law the rights specified in the Federal Indian Civil Rights Act, 25 U.S.C. Section 1302 et seq.

Those guarantees are not mere pretty words conferring rights without a remedy.

Constitutions and constitutional and civil rights have not been developed and are not revered because they were developed and intended to protect the majority or to protect those in power at any particular time. The majority and the leadership in any government are always able to protect themselves.

Lawyers who came to their profession with a sense of history and purpose recognize that basic truth. In 1954, Linda Brown, her family, and her neighbors in Topeka, Kansas, did not have the advantage of a majority of the votes, influential lobbyists, or the overwhelming support of most of the press. They had a Constitution and a fair tribunal. **Brown v. Topeka Board of Education**, 347 U.S. 483 (1954). Without a tribunal willing and with jurisdiction to enforce them, constitutional and civil rights are mere pretty words.

The Court below, the Third District Appellate Court

asserts that sovereign immunity prohibits review of the Tribe's actions in any and all circumstances, and cites multiple cases in support of sovereign immunity for Indian tribes. Many of the cases cited, however, do not raise any tribal constitutional or **ICRA** claims. The Tribal Council Respondents boldly assert that the Tribe's own **BILL OF RIGHTS** and the **ICRA** constitute nothing more than a right without a remedy.

THE CALIFORNIA COURT ERRED ON AN IMPORTANT QUESTION OF LAW BY ITS FINDING THAT PL-280 DOES NOT REQUIRE THE ENFORCEMENT OF A TRIBAL CONSTITUTION AND A FEDERAL STATUTE ENSURING BASIC CONSTITUTIONAL RIGHTS TO INDIVIDUAL INDIANS IN CALIFORNIA TRIBES

California is one of a handful of states subject to what is commonly called Public Law-280 [28 U.S.C. 1360 et seq.]. PL-280 was enacted by Congress, mandating, *inter alia*, jurisdiction of suits between Indians in a limited number of states, to the courts of those states. The State of California's reluctance to perform this unfunded mandate has caused a vacuum not of jurisdiction but of the legitimate and necessary exercise of that jurisdiction.[1] It is one of those accidents of

---

1. The vacuum has been both noticed and ignored, for decades. In 1997, the Sacramento Bee reported:

Every week, and sometimes more than once or twice

history that a statute enacted in 1953, during the era of termination of Indian tribes, is now available to protect individual tribal members from oppression by officials of their own tribal governments.

It is instructive that the leading case on the application of PL-280, **United States v. Wadena**, 152 F.3d 831 (Eighth Cir., 1998) arising from Minnesota, another State subject to PL-280, addresses well the true interplay

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a week, we get calls on jurisdictional issues and I end up telling the CHP, county sheriff's deputies and local police departments that Indians are entitled to the same level of police protection as any other citizen in California," said Mike Smith, deputy area director of the U.S. Bureau of Indian Affairs in California. ....

The BIA took Public Law 280 as a signal to get out of California. California's two federal Indian hospitals closed, and the BIA stopped providing health care, welfare and education to California's Indians. "California was cut clear out of the federal budget for three or four years," Smith said.... The BIA spends $15 million a year on 298 tribal courts nationwide. But California tribes see little of that money because for years the BIA claimed California's courts -- not the federal government -- were supposed to provide justice in California Indian country under Public Law 280. Sacramento Bee, *California's Lost Tribes, A Special Report*, Steve Magagnini, July 1, 1997.

between the ICRA and PL- 280.

Wadena and other defendants in that action challenged in Federal court their convictions for federal crimes which resulted from corruption by tribal officials on the White Earth [Chippewa] Reservation in northwestern Minnesota. The White Earth Band is one of the six constituent bands of the Minnesota Chippewa Tribe.

Wadena and his co-conspirators, after their convictions, unsuccessfully challenged the jurisdiction of the Federal Courts, insisting that criminal prosecution for any crime **could only be obtained through the State Court,** pursuant to PL-280.

The Eighth Circuit, in affirming the federal convictions, took the opportunity to discuss at length the interplay of the ICRA, PL-280 and the appropriateness and the propriety of jurisdiction over tribal officials who abuse their members.

The Court acknowledged that prior opinions had seemed both confusing and inconsistent. It rejected the convicted tribal officials' claims that only crimes within the Indian Country Crimes Act and the Indian Major Crimes Act may be the basis for federal court jurisdiction. Id. at para. 40-1. In upholding the convictions, the Court did not find nor hold that there was no jurisdiction in the state court pursuant to PL-280. It found instead that there was concurrent jurisdiction to enforce violations of the specific federal criminal statutes involved in their prosecutions.

In its discussion, the Court explained the interrelationship of PL-280 and the ICRA and the impact of

assertions of sovereign immunity by the conspiring tribal officials. Id. at para. 56-61. The Court found that there was: "...no challenge to the legitimate actions of the tribe or its representatives. The charge is directed toward the individual members of the RTC [Tribal Council] who conspired to deprive the members of the Band of their civil rights guaranteed by the ICRA. The Band's right to self determination, which the court sought to protect in Santa Clara, is not being threatened by ensuring that voters are not defrauded. In fact, the Band's right to free and open elections is vindicated by the present criminal action. Id. at para. 64.

The California appellate court below holds that merely because a federal court cannot grant relief to these Petitioners, that Congress must not have intended to give jurisdiction to the Courts of California. If Congress had intended to set up tribal courts in California and four other states in 1953 (Alaska was added in 1958), Congress would have passed some other statute than PL-280.

THE CALIFORNIA COURT OF APPEAL ERRED ON *AN IMPORTANT QUESTION OF LAW* BY ITS FINDING THAT EX PARTE YOUNG DOES NOT APPLY TO TRIBAL OFFICIALS WHO ACT IN EXCESS OF THEIR AUTHORITY IN VIOLATION OF THEIR OWN CONSTITUTION AND FEDERAL LAW

The doctrine of **Ex Parte Young**, 209 U.S. 123 (1908) applies and has been applied by other courts in which abusive or overreaching officials have attempted to shield themselves in a cloak of sovereign immunity. Edward T. Young had been sued in his capacity as the Attorney General of the State of Minnesota by stockholders of a railroad company who sought to enjoin a statute passed by the legislature which reduced tariffs. The facts regarding jurisdiction mirror this controversy:

> Edward T. Young, attorney general, who appeared specially and only for the purpose of moving to dismiss the bill as to him, on the ground that the court had no jurisdiction over him as attorney general; and he averred that the state of Minnesota had not consented, and did not consent, to the commencement of this suit against him as attorney general of the state, which suit was in truth and effect a suit against

> the said state of Minnesota, contrary to the 11th
>
> Amendment of the Constitution of the United States. Id at 132.

Dawavendewa v. Salt River Project, 276 F.3d 1150 (9th Cir. 2002) is in accord with this conclusion. Dawavendewa, a member of the Hopi Tribe, attempted to bring an action in Federal Court challenging the Navajo preference required by that Tribe at the Navajo Generating Station. He asserted that his action could proceed against individual tribal officers because of the sovereign immunity of the Tribe itself. He did not allege that the tribal officials were acting in violation of their own Constitution nor of the ICRA. The Ninth Circuit, **because of the absence of such circumstances**, declined to allow actions to proceed against those officials. **But they specifically reaffirmed the propriety of such action if tribal officials acted beyond their authority or against the law or Tribal constitution.** The Ninth Circuit held:

> [52] In this case, the Nation has not waived its tribal sovereign immunity
> and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases. Dawavendewa, undaunted, argues that tribal sovereign immunity does not exist because the suit could be sustained against tribal officials.
>
> We disagree.

[53] To support this proposition, Dawavendewa relies heavily on **Burlington N. R.R., v. Blackfeet Tribe**, 924 F.2d 899 (9th Cir. 1991), and **Arizona Pub. Serv. Co. v. Aspaas** , 77 F.3d 1128 (9th Cir. 1996). **In Blackfeet Tribe, we extended the doctrine of Ex Parte Young, 209 U.S. 123 (1908), to tribal officials. In particular, we held that, in cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute.** See **Blackfeet Tribe**, 824 F.2d at 901.

[54] In **[Arizona Public Serv. Comm'n v.] Aspaas**,[77 F.3d (9th Cir., 1996] the Navajo Supreme Court had determined that the Arizona Public Service Company's ("APS") anti-nepotism policy violated Navajo employment discrimination law. APS then filed suit in federal district court seeking injunctive relief against the Navajo Nation, its executive agencies, Navajo Supreme Court Justices, and tribal officials challenging their authority to regulate APS's employment practices. **The defendants argued that they enjoyed sovereign immunity from suit. We held that the Nation and its executive**

> **agencies were immune from suit, but reaffirming our decision in Blackfeet Tribe, we held that sovereign immunity did not bar prospective relief against the individual tribal officials acting beyond the scope of their authority in violation of federal law.** See Aspaas, 77 F.3d at 1133-34.
> [55]..... **Rather, the doctrine announced in Blackfeet Tribe and reaffirmed in Aspaas permitted suits against officials allegedly acting in contravention of federal law.** (Emphasis supplied) Id. at para. 52-5

The Ninth Circuit, in its discussion of the impact of violation of federal law, for purposes of its discussion the very ICRA which is implicated here, affirms the viability and applicability of **Ex Parte Young** to tribal officials in appropriate cases.

Tribal Courts, in states in which PL-280 has not mandated that the courts of the state exercise jurisdiction, have protected individual tribal members from the abuses of officials of their own tribes. **Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners,** 23 Indian Law Rptr. 6045 (Cheyenne River Sioux Tribal Court of Appeals, 1996). **Thompson** squarely holds that for injunctive and declaratory relief suits against tribal officials no waiver of sovereign immunity is required since the scope of tribal sovereign immunity under tribal law does not extend to such actions." *Id.* at 23 ILR 6048.

The Court in **Thompson**, *supra,* the Court of Appeals of the Las Vegas Paiute Tribe in **Terry-Carpenter et al. v. Las Vegas Paiute Tribe,** 29 Indian Law Rptr. 6041, (Ct. App. LV Paiute Tribe, 2002) and the United States Supreme Court in **Marbury v. Madison**, 5 U.S. (1Cranch) 137 176-77 (1803) all share and are based upon the principle that judicial review is not a mere consequence of direct legislative delegation of powers to the courts but is based upon the very nature and theory of having a written constitution.

In accord is the decision of the Fort Peck Tribal Court of Appeals in *Ft. Peck Sioux Council v. Ft. Peck Tribes,* (Appendix F, 43a, *infra*), a court in another jurisdiction in which tribal members have access to an independent court. The Ft. Peck Court held squarely that the Fort Peck Tribes do not enjoy sovereign immunity when a provision of the Tribal Code is challenged as unconstitutional. That court noted and accepted the argument: "

> (t)o say that the Tribes and its elected officials cannot be sued creates chaos, discontent (and) an atmosphere ripe for abuse of power and authority..creating a new class of individuals that become simply...above the law. App.. at 48a.

In California tribes, the Courts of California are the Courts designated by Congress by PL-280 to adjudicate disputes between Indians and to protect individual Indians utilizing their own Constitutions and the ICRA.

Unless courts in those states where jurisdiction has

been either ignored or exercised for decades pursuant to Public Law 280, there will be more mischief, chaos and discontent. There is a crisis in Indian country that has resulted from the failure of some tribal officials to respect the rights and property of their members.

A commentator friendly to tribes, and to their members, addressed the issue. In discussing the steady erosion of the sovereignty that tribes so jealously protect, L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty after Atkinson and Hicks*, 37:3 New Eng. L. Rev. 669, lays much of the blame at the failure of courts to protect individual members of tribes from abuses by their own governments.

> Among the proposals to overcome **Atkinson [Trading v. Shirley**, 532 U.S. 645 (2001)] and **[Nevada v.] Hicks** [533 U.S. 353 (2001), many center on efforts to protect tribal courts from federal review, or to expand their jurisdiction, or to protect them with a constitutional amendment. Yet proposals that focus only on tribes, not individuals, are bound to fail. This is because tribe-centered proposals rely on the doctrines of inherent sovereignty and congressional trust responsibility–doctrines that themselves have failed.
>
> In the hands of Congress and the Court, these two doctrines, virtually lacking in constitutional support, have disappointed

> tribes and members, helping to isolate tribes within their reservations and to trivialize the constitutional rights of Indians as individuals. Tribes that would embrace a new awakening of sovereignty should avoid these doctrines. They should instead seek solutions that recognize that tribal sovereignty is best protected by first protecting individuals.
> *Id* at 692-3

In-view of what has happened in the nearly three decades since *Martinez* was decided, this Court may want to revisit that doctrine. It should in any event require those courts which have jurisdiction over suits to which Indians are parties to protect individual members of tribes in those states.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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March 15, 2005

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT (Shasta)

121 Cal.App.4th 946, 17 Cal.Rptr.3d 517,

August 18, 2004

LORENA ACKERMAN ET AL., PLAINTIFFS AND APPELLANTS,
v.
TRACY EDWARDS, INDIVIDUALLY AND AS CHAIRPERSON, ETC., ET AL., DEFENDANTS AND RESPONDENTS.

APPEAL from a judgment of the Superior Court of Shasta County, James Ruggiero, J. Affirmed. (Super. Ct. No. 149120).

Cibula & Cibula, Franklin S. Cibula; and Michael V. Stuhff for Plaintiffs and Appellants.

Rapport & Marston and David J. Rapport for Defendants and Respondents.

The opinion of the court was delivered by: Raye , J.

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Plaintiffs Lorena Ackerman et al. (Ackerman) claim membership in the Redding Rancheria Tribe (Rancheria), a federally recognized Indian tribe. Ackerman filed a petition for writ of mandate against defendant members of the Rancheria Tribal Council (Council) challenging a resolution

adopted by the Council. The resolution set forth procedures for conducting hearings on the reconsideration of a member's enrollment in the tribe. Ackerman and her fellow plaintiffs argued the resolution violated their right to due process under the Rancheria's constitution and the Indian Civil Rights Act (ICRA).*fn1

In response, the Council filed a motion to quash service of summons, a motion to dismiss, and a demurrer. The trial court granted the motion to quash, finding it lacked jurisdiction over Ackerman's claim. Ackerman appeals, arguing the trial court possesses jurisdiction under the ICRA, and the resolution, by shifting the burden of proof to Ackerman, denied Ackerman's right to due process. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Rancheria

The Rancheria is a federally recognized Indian tribe operating pursuant to a constitution adopted in 1987 and amended in 1989. Under the constitution, a tribal council consisting of seven elected members governs the Rancheria. The Council possesses the power to adopt an enrollment ordinance governing tribal membership.

Under the constitution, members of the Rancheria consist of: "a) All of the seventeen (17) original distributees listed on the plan of distribution of the Redding Rancheria, dated October 8th, 1959. [¶] b) All lineal descendents of the seventeen (17) original distributees . . . ."

The Council, in 1987, adopted the Redding Rancheria

Enrollment Procedures Act (Act), which sets forth the requirements for enrollment in the Rancheria. Under the Act, the Council shall review each application for enrollment together with the recommendation of the enrollment committee and determine whether the applicant is eligible to be enrolled as a member of the Rancheria. "The person filing an application has the burden of proof of establishing to the satisfaction of the . . . Council that the applicant meets all of the requirements for tribal membership." The Council shall consider all relevant evidence regarding an applicant's eligibility, "but the relevancy, weight, and sufficiency of such evidence shall be determined by the . . . Council."

The Act requires the Council to make a written decision that includes findings of fact. The Act does not require a formal hearing. If the Council determines an applicant is not eligible, the rejected applicant can appeal to the membership of the tribe at a regular meeting of the general council.

In 1994 the Council amended the Act, adding article V, governing reconsideration of enrollment. Under article V, if the Council or enrollment committee discovers, after an application for enrollment has been approved or denied, that a member may have misrepresented or omitted facts affecting eligibility, the application shall be reconsidered in accordance with the procedure for processing an original application.

Reconsideration at Issue

In the summer of 2002 the enrollment committee received two letters from a Rancheria elder casting doubts

upon the eligibility of member Lorena Butler. The letters suggested Butler was not the daughter of Virginia Timmons, an original distributee listed on the Rancheria distribution plan.

Ackerman and her fellow plaintiffs are all members of the Foreman family, who are the children and grandchildren of Butler. The Foreman family claims membership in the Rancheria through Timmons.

The enrollment committee reviewed Butler's application for membership. The application file contained neither a birth certificate nor baptismal records establishing Timmons as Butler's mother. The enrollment committee notified the Council about the deficiencies.

On the basis of the review of the application file, the enrollment committee found that Butler might have omitted facts affecting her eligibility for enrollment in the Rancheria. Under the Act, this determination required the Council to reconsider Butler's enrollment.

Because of the size of the Foreman family and the potential impact on the Rancheria, the Council adopted resolution 014-04-01-03 (Resolution). The Resolution is titled: "Resolution of the Tribal Council of the Redding Rancheria Establishing Procedures for Conducting Hearings on a Recommendation by the Enrollment Committee to Reconsider Enrollment of a Tribal Member."

The Resolution establishes a procedure requiring a hearing officer to preside over a formal hearing on the reconsideration of eligibility. The hearing officer must be an impartial and experienced attorney. The Resolution specifies

the hearing officer preside over the hearing, questioning witnesses, ruling on issues of law, and preparing a written decision for Council consideration. Nothing in the Resolution alters the standard governing the burden of proof as set forth in the Act.

According to the Council, the resolution provides Rancheria members subject to disenrollment procedures greater procedural protections than those contained in the Act.

The Present Action

Ackerman filed a petition for writ of mandate in the trial court against the Council members, challenging the resolution. In response, the Council filed a motion to quash service of summons, motion to dismiss, and demurrer to the petition. The Council argued the trial court lacked both personal and subject matter jurisdiction over Ackerman.

The trial court granted the Council's motion to quash service of summons based on a lack of jurisdiction. The court found the Council made a sufficient showing of entitlement to sovereign immunity.

The court, in granting the motion, quoted from Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49 [56 L.Ed.2d 106] (Santa Clara Pueblo) that "[n]othing on the face of Title 1 of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." (436 U.S. at p. 59.) The trial court explained, "While the petitioners argue that this case dealt only with the federal court's jurisdiction, there is nothing in the reasoning of Santa

Clara Pueblo that would limit its application only to federal courts. In addition, to find an exception for state courts would be inconsistent with the rationale of the decision. Further, the reasoning of the Santa Clara Pueblo case makes clear that there is no private right of action created by the ICRA. The petitioners cannot establish jurisdiction pursuant to this section whether the suit is considered against the tribe or individual members."

The court also found no jurisdiction by virtue of Public Law 280 (28 U.S.C. § 1360), concluding Bryan v. Itasca County (1976) 426 U.S. 373 [48 L.Ed.2d 710] (Bryan) makes clear that the purpose of Public Law 280 was not to resolve disputes that affect the tribe and its ability to govern itself. The court ruled: "This is consistent with the rule of law that a petitioner cannot avoid the application of sovereign immunity of the tribe, by suing individual members where the real effect of the suit is on the tribe."

Following entry of judgment of dismissal, Ackerman filed a timely notice of appeal.

DISCUSSION

I.

We begin with a brief review of Indian tribal sovereignty. Indian tribes are distinct, independent political communities that retain their original natural rights in matters of local self-government. Although no longer possessing the full attributes of sovereignty, they remain a separate people possessing the power of regulating their internal and social relations. Indian tribes have the power to

make their own substantive law in internal matters and to enforce that law in their own forums. (Santa Clara Pueblo, supra, 436 U.S. at pp. 55-56.

As separate sovereigns preexisting the United States Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. However, Congress retains the plenary authority to limit, modify, or eliminate the powers of local self-government that tribes otherwise possess. (Santa Clara Pueblo, supra, 436 U.S. at pp. 56-58.)

Title 1 of the ICRA, 25 United States Code sections 1301-1303 represents an exercise of this authority. Section 1302(8) states: "No Indian tribe in exercising powers of self-government shall -- [¶] . . . [¶] . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." "In 25 USC 1303 [25 USCS § 1303], the only remedial provision expressly supplied by Congress, the `privilege of the writ of habeas corpus' is made `available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe.'" (Santa Clara Pueblo, supra, 436 U.S. at p. 58.)

Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. This immunity is subject to the superior and plenary control of Congress. However, absent congressional authorization, the tribes are exempt from suit. (Santa Clara Pueblo, supra, 436 U.S. at p. 58.)

II.

Both parties urge application of the Supreme Court decision in Santa Clara Pueblo, but to very different ends. In Santa Clara Pueblo, the respondent, a female member of the Santa Clara Pueblo tribe, brought an action for declaratory and injunctive relief against enforcement of a tribal ordinance denying membership to children of female members who marry outside the tribe. However, the ordinance extended membership to children of male members who marry outside the tribe. The respondent claimed the rule discriminated on the basis of both sex and ancestry in violation of title 1 of the ICRA. (Santa Clara Pueblo, supra, 436 U.S. at pp. 51-52.)

The Santa Clara Pueblo court found that nothing on the face of title 1 of the ICRA purports to subject the tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. (Santa Clara Pueblo, supra, 436 U.S. at p. 59.) However, the court considered whether the relief sought by the respondent, although not expressly authorized by the ICRA, was nonetheless implicit in its terms. (Ibid.)

The court delineated two distinct and competing purposes of the ICRA: to strengthen the position of individual tribal members vis-...-vis the tribe and to promote the well-established federal policy of furthering Indian self-government. (Santa Clara Pueblo, supra, 436 U.S. at p. 62.) The court found that imposition of a federal cause of action for enforcement of the rights created in title 1 of the ICRA, however useful in securing compliance with 25 United States

Code section 1302, would undermine the authority of tribal forums and impose serious financial burdens on financially disadvantaged tribes. (Santa Clara Pueblo, supra, 436 U.S. at p. 64.)

The court ultimately determined: "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. [Fn. omitted.] Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non- Indians. [Fn. omitted.] [Citations.] Non-judicial tribal institutions have also been recognized as competent law-applying bodies. [Citation; fn. omitted.] Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief." (Santa Clara Pueblo, supra, 436 U.S. at pp. 65-66.)

In addition, "By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials[,] Congress may also have considered that resolution of statutory issues under [25 United States Code] § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." (Santa Clara Pueblo, supra, 436 U.S. at p. 71.)*fn2 Therefore, the Supreme Court found section 1302 does not impliedly authorize actions for declaratory or injunctive relief against either a tribe or its officers. (Santa Clara

Pueblo, supra, 436 U.S. at p. 72.)

III.

Ackerman and the other plaintiffs contend Public Law 280 grants jurisdiction to California courts to consider their action for writ of mandate against Council members. Title 28 United States Code section 1360, Public Law 280 provides, in pertinent part: "[California] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties[.]" Ackerman construes Public Law 280 to grant California courts jurisdiction over a dispute between a tribal member and the tribe. According to Ackerman, "Here in California, the role of tribal courts has been given to the State by Congress in PL 280."

Ackerman's assertion rests on very tenuous reasoning. Under Ackerman's theory, the Santa Clara Pueblo court determined that Congress rejected direct action by the federal courts, instead finding jurisdiction in "other courts." According to Ackerman, in most other states these are "tribal courts," but in California it is the state court.

Such reasoning turns Santa Clara Pueblo on its head. The Supreme Court discussed only tribal courts and non-judicial tribal institutions as possessing jurisdiction over tribal matters. The Supreme Court did not leave jurisdiction open to "courts" in general or state courts in particular. The Supreme Court carefully explained its rationale for leaving disputes over the ICRA to tribal courts and institutions. This rationale does not support any conferral of jurisdiction on state courts.

As the Council points out, the Supreme Court

explicitly denied that Public Law 280 confers jurisdiction in the states over the tribes themselves: "The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves." (Bryan, supra, 426 U.S. at pp. 388-389.) California courts are in accord. "No case has been cited to us, and we have found none, which concludes or even suggests, that 28 United States Code section 1360 [Public Law 280] conferred on California jurisdiction over the Indian tribes, as contrasted with individual Indian members of the tribes." (Long v. Chemehuevi Indian Reservation (1981) 115 Cal.App.3d 853, 857.)

We find no merit in Ackerman's assertion that the courts of California have jurisdiction over disputes between tribal members and tribes through Public Law 280. As the trial court correctly observed, to extend jurisdiction to state courts would be inconsistent with the reasoning of Santa Clara Pueblo.

IV.

Ackerman argues the tribe's sovereign immunity is subject to the exception enunciated in Ex parte Young (1908) 209 U.S. 123 [52 L.Ed. 714] (Young).) In Young, the Supreme Court found a suit challenging the constitutionality of a state official's action not barred by sovereign immunity. Ackerman draws a parallel between the Council and the official in Young, arguing the exception to immunity is applied against "abusive or overreaching officials [who] have attempted to shield themselves in a cloak of sovereign immunity."

However, as the Council points out, federal courts have imposed two requirements on litigants seeking to apply the Young exception to tribal officials. "According to the Second Circuit in Garcia [v. Akwesasne Housing Authority (2d Cir. 2001) 268 F.3d. 76], there are at [sic] two qualifications to obtaining such prospective injunctive relief against tribal officials sued in their official capacity. `First, any law under which [the plaintiffs] seek[] injunctive relief must apply substantively to the agency. . . . Second, [the plaintiffs] must have a private cause of action to enforce the substantive rule.' Garcia, 268 F.3d at 88." (Bassett v. Mashantucket Pequot Museum and Research (D.Conn. 2002) 221 F.Supp.2d 271, 278, fn. 12.)

Ackerman seeks to enforce both the ICRA and the tribe's constitution. However, in Santa Clara Pueblo, the Supreme Court found the ICRA does not confer a private right of action as an enforcement mechanism. Instead, the court found the Congress, in implementing 25 United States Code section 1303, decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments. The court also noted the Congress had considered and rejected proposals for federal review of alleged violations of the ICRA arising in a civil context. (Santa Clara Pueblo, supra, 436 U.S. at pp. 66-69.)

Nor does the Rancheria constitution provide a private right of action to enforce its provisions in state court. The constitution states: "The rights of the Redding Rancheria members are those which are guaranteed by the Indian Civil Rights Act of 1968." The constitution states the Council, in

exercising powers of self- government, shall not violate the rights enumerated in the ICRA. In addition, the constitution grants the Council the power to adopt an enrollment ordinance and to ensure the ordinance is "reasonable, fair, and just and that the Ordinance reflects the will of the people." Nothing in this language creates a private right of action in state court to enforce those rights.

Since neither the ICRA nor the Rancheria constitution create a private cause of action, Ackerman cannot invoke the exception codified in Young. We find no exception to the Rancheria's sovereign immunity.*fn3

DISPOSITION

The judgment is affirmed. The Rancheria shall recover costs on appeal.

We concur: DAVIS , Acting P.J., MORRISON , J.

Opinion Footnotes

*fn1 Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. § 1301 et seq.

*fn2 As the court noted, "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. [Citations.] Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." (Santa Clara Pueblo, supra, 436 U.S. at p. 72, fn. 32.)

*fn3 Since we find the Rancheria entitled to sovereign immunity, we do not address the substance of Ackerman's due process arguments.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SHASTA

LORENA ACKERMAN, et al..	FILED SEPT 25, 2003 CLERK OF THE SUPERIOR COURT BY:T.BRAM DEPUTY CLERK
Plaintiff,	
vs.	Case No. SCRDCVPT-03-0149120
TRACY EDWARDS, Chairperson, et al.	JUDGMENT OF DISMISSAL
Defendants.	

/

The motion by respondents Tracy Edwards, Hope Wilkes, Jack Potter, Debbie Sarot, Virgil Baker, Sr., Richard Burns, and Patty Spaulding ("respondents") to quash service of summons and dismiss the pending action against them came on for hearing before the Court on August 18, 2003. Franklin S.Cibula, Cibula & Cibula, appeared as counsel for petitioners. David J. Rapport, Rapport and Marston,

appeared as counsel for respondents.

The Court considered the evidence and the argument presented by the parties, and issued its Ruling on Motion to Quash Service of Summons ("Ruling"), dated August 20, 2003.

Having considered the evidence and argument and for the reasons set forth in the Ruling, it is hereby order, adjudged and decreed that:

1. Service of summons on respondents is hereby quashed andthis action is hereby dismissed in its entirety.
2. Plaintiffs shall take nothing by their petition for writ of mandate.
3. Respondents shall recover their costs of suit from petitioners.

Dated September 5, 2003

S\JAMES RUGGIERO
Judge of the Shasta
County Superior Court

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CLERK OF THE SHASTA
COUNTY SUPERIOR
COURT—CIVIL DIVISION

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

HON. JAMES RUGGIERO

Dept 4
lav

#149120
LORENA ACKERMAN, et al.,
Plaintiffs,
vs.
TRACY EDWARDS, et al.
Defendants.

NATURE OF PROCEEDINGS:RULING ON MOTION TO QUASH SERVICE OF SUMMONS

The Court declines to consider the "further reply" submitted by the petitioners as unauthorized and untimely. The Court also notes that attorney Michael V. Stuhff has signed the motion papers along with counsel for the petitioners. The court declines to recognize the (sic) Mr. Stuhff because he is not admitted to practice in this state and has not been granted permission to appear pro hac vice.

The motion to quash service of summons based on lack of jurisdiction is GRANTED and the petition is dismissed. The Court finds that the respondents have made a sufficient showing that they are entitled to sovereign immunity in this case.

The court in *Santa Clara Pueblo v. Martinez,* (1978) 436 U.S. 49, stated: "Nothing on the face of Title 1 of the

ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief." Id. at page 59. While the petitioners argue that this case dealt only with the federal court's jurisdiction, there is nothing in the reasoning of *Santa Clara Pueblo* that would limit its application only to federal courts. In addition, to find an exception for state courts would be inconsistent with the rationale of the decision. Further, the reasoning of the *Santa Clara Pueblo* case makes clear that there is no private right of action created by the ICRA. The petitioners cannot establish jurisdiction pursuant to this section whether the suit is considered against the tribe or individual members.

As to jurisdiction pursuant to PL 280, the court's discussion of the purpose of PL 280 in *Bryan v. Itasca County, Minnesota* (1976) 426 U.S. 373, makes clear that its purpose was not to resolve the type of dispute the petitioners bring which affects the tribe and its ability to govern itself. This is consistent with the rule of law that a petitioner cannot avoid the application of sovereign immunity of the tribe, by suing individual members where the real effect of the suit is on the tribe.

No action pursuant to the *Ex Parte Young* doctrine is stated. Petitioners have made no showing that the resolution enacted, or meeting cancelled, is beyond the authority of the tribe to undertake or in violation of federal law. Indeed, the right to govern membership is a right inherent in tribal governance. In addition there is no showing that the members of the tribal council acted outside their authority.

The declaration of Tracy Edwards establishes that the respondents are indeed policy-making officials and were exercising their discretion when engaged in the conduct that is the basis for this suit. They are therefore entitled to

immunity even under the more restrictive standard of *Turner v. Martire,* (2000) 82 Cal App.4th 1042, review denied.

August 20, 2003 s\JAMES RUGGIERO,JUDGE

CERTIFICATE OF MAILING
STATE OF CALIFORNIA, COUNTY OF SHASTA

I, the undersigned, certify under penalty of perjury under the laws of the State of California that I am a deputy Court Clerk of the above-entitled court and not a party to the within action: that I mailed a true and correct copy of the above to each person listed below by depositing same in the United States Post office in Redding, California, enclosed Sealed envelopes with postage prepaid
Dated: august 20, 2003 s\Deputy Clerk

cc:

Franklin Cibula, Esq., 1743 Tehama St., Redding, CA 96001
Michael V. Stuhff, Esq., 515 S. Third St., Las Vegas, NV 89101
David J. Rapport, Esq., P.O. Box 488, Ukiah, CA 95482

APPENDIX D

COURT OF APPEAL, THIRD APPELLATE DISTRICT-
No. C045118
S128086
IN THE SUPREME COURT OF CALIFORNIA
En Banc

LORENA ACKERMAN, et al., Plaintiffs and Appellants,
v.
TRACY EDWARDS, Individually and as Chairperson etc. et al., Defendants and Respondents.

Application to appear pro hac vice denied. (Cal Rules of Court, rule 983(b).)
Petition for review DENIED.

GEORGE
Chief Justice

SUPREME COURT
FILED
DEC 15 2004
FREDERICK K.
OHIRICH CLERK
DEPUTY

APPENDIX E

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FILED
JUN 23 2003
CLERK SUPERIOR
BY: C.CRABTREE, DEPUTY

SUPERIOR COURT IN AND FOR SHASTA COUNTY

STATE OF CALIFORNIA

****

LORENA ACKERMAN, EDWARD "BOB" FOREMAN, LEON FOREMAN, Sr., YVONNE WILSON, LYNETTE COOPER, TRACY LEROY, CHERYL FULLERTON TANYA FOREMAN, ANTHONY GANNETT,

Petitioners,

vs.

CASE NO. 149120_____

TRACY EDWARDS, Chairperson, individually, and in her official capacity as Chairperson Of the Redding Rancheria, a Federally recognized Indian Tribe, HOPE WILKES, individually, And in her official capacity as Vice-chairperson of the Redding Rancheria, JACK POTTER, individually, and in his official capacity as Secretary of the Redding Rancheria, LEON BENNER, ,individually, and in his official capacity as Treasurer of the Redding Rancheria, DEBBIE SAROT, in her official capacity as a Member of the Redding Rancheria Tribal Council, VIRGIL BAKER, Sr., individually, and in his official capacity as a Member of the Redding Rancheria **Tribal Council, RICHARD BURNS, individually, and in his official capacity as an alternate Member of the Redding Rancheria Tribal Council, PATTY SPAULDING, individually, and in her official capacity as an alternate Member of the Redding Rancheria Tribal Council, JOHN and JANE DOES, I through X inclusive, in their official and/or individual capacities,**

Respondents.

PETITION FOR ALTERNATIVE WRIT OF MANDATE AND PROHIBITION

To: The above-entitled Respondents

The Petition respectfully shows:

JURISDICTIONAL STATEMENT

The Redding Rancheria is a Federally recognized Indian Tribe exercising powers of self government, operating pursuant to a Constitution lawfully adopted on December 30, 1989. The **REDDING RANCHERIA** was restored and regained its status as a federally recognized rancheria on December 22, 1983, by the United States District Court for the District of California through Civil Docket No. C-70-1710-S.W., ***Tillie Hardwick, et al., v. United States of America, et al.***

The organizing members of the Redding Rancheria chose not to establish a separate Tribal judicial structure and bureaucracy, relying on the existing judicial structure relied upon, since 1953, by most other Federally recognized Indian Tribes within the State of California. Jurisdiction is mandated by Congress in this Court pursuant to an act of Congress, Public Law 280, Act of Aug. 15, 1953, ch.505, 67 Stat. 588-90.

This action is not against the **REDDING RANCHERIA**. The immunity of a tribe itself to an ordinary tort suit, recognized in ***Redding Rancheria v. Shasta County Superior Court***, 88 Cal App.4th 384, 105 Cal.Rptr.2d 773, 2001, has no application in the instant action. The Respondents are officers and/or Councilmembers who are sued individually and/or in their official capacities pursuant to the Indian Civil Rights Act, 25 USCA Section 1302, (hereinafter, **ICRA**) and the **REDDING RANCHERIA**

CONSTITUTION. The California Code of Civil Procedure, Sections 1085 and 1102, provide, in relevant part, that :

> Sec.1085. A writ of mandate may be issued by any court to any...person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right...to which the party is entitled, and from which the party is unlawfully precluded by such ..person.
>
> Sec.1102. The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person

The United States Supreme Court, in restricting immediate access by victims such as Petitioners herein from **Federal** Courts, requires the courts having jurisdiction, in most other states and reservations, a tribal court, to apply the **ICRA** and their own Constitutional guarantees:

> Tribal forums are available to vindicate rights created by the ICRA
> [here the Public Law 280 designates this Superior Court as the
> appropriate court for disputes involving members of this Tribe.] and
> the Section 1302 has the **substantial and intended effect of changing**
> **the law which these forums are obliged to apply** *Santa Clara*
> *Pueblo v. Martinez*, 436 U.S. 49 at 66 (Emphasis supplied)

In the case of most California tribes, the Public Law 280 court is the court having jurisdiction in any action between Indians or to which Indians are parties. Congress, the **Santa Clara Pueblo** decision found, had considered alternative methods of assuring constitutional rights to individual Indians. Congress considered and rejected direct action by the Federal Courts and the Federal government. In balancing the interests of the Tribes, many of which were poor and at some distance from Federal forums, Congress decided and mandated that the local, usually, but not always, Tribal courts must apply the principles of the **ICRA:**

> The cost of civil litigation in
> **federal** district courts, in many
> instances located far from the
> reservations, doubtless exceeds
> that in most tribal forums....

> And as became apparent in congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending **federal** lawsuits. **Santa Clara Pueblo**, *supra*, at 66, footnote 19 (emphasis supplied)

1. Petitioners, **LORENA ACKERMAN, EDWARD "BOB" FOREMAN, LEON FOREMAN, Sr., YVONNE WILSON, LYNETTE COOPER, TRACY LEROY, CHERYL FULLERTON, TANYA FOREMAN, and ANTHONY GANNETT** are and have been members of the **REDDING RANCHERIA**, and are grandchildren of **VIRGINIA TIMMONS.**

2. **VIRGINIA TIMMONS** was the mother of **LORENE BUTLER**, nee` **BROWN** and had been widely known as such and acknowledged her maternity. Both **TIMMONS** and **BUTLER** are now deceased. At some recent time, Respondents have begun to claim and allege that **VIRGINIA TIMMONS**, ancestor of Petitioners, died childless.

3. Respondents, **TRACY EDWARDS,** Chairperson, individually, and in her official capacity as Chairperson of the Redding Rancheria, a Federally recognized Indian Tribe, **HOPE WILKES,** individually, and in her official capacity as

Vice-chairperson of the Redding Rancheria, **JACK POTTER,** individually, and in his official capacity as Secretary of the Redding Rancheria, **LEON BENNER,** individually, and in his official capacity as Treasurer of the Redding Rancheria, **DEBBIE SAROT,** in her official capacity as a Member of the Redding Rancheria Tribal Council, **VIRGIL BAKER**, Sr. individually, and in his official capacity as a Member of the Redding Rancheria Tribal Council, **RICHARD BURNS**, individually, and in his official capacity as an alternate Member of the Redding Rancheria Tribal Council, **PATTY SPAULDING,** individually, and in her official capacity as an alternate Member of the Redding Rancheria Tribal Council, at all times relevant to this action, are and were members of the **REDDING RANCHERIA TRIBAL COUNCIL.** At a meeting of that Tribal Council, on April 8, 2003, Respondents, **TRACY EDWARDS, HOPE WILKES, JACK POTTER** and **LEON BENNER,** enacted **REDDING RANCHERIA TRIBAL COUNCIL RESOLUTION 014-04-01-03,** *RESOLUTION OF THE TRIBAL COUNCIL OF THE REDDING RANCHERIA ESTABLISHING PROCEDURES FOR CONDUCTIONG HEARINGS ON RECOMMENDATION BY THE ENROLLMENT COMMITTEE TO RECONSIDER ENROLLMENT OF A TRIBAL MEMBER,* a copy of which is attached hereto as Exhibit "A" and incorporated as if set forth fully herein.

4. Respondents, **DEBBIE SAROT** , a descendant as the Petitioners, of **VIRGINIA TIMMONS**, and another target of the Resolution, opposed the said Resolution. Tribal

Council members **EDWARD "BOB" FOREMAN** and **TRACY LEROY**, Petitioners in this action and targets of Respondents, also opposed the Resolution. Respondents, **DEBBIE SAROT** is sued only in her official capacities and no damages, fees or costs are sought from such Respondent individually.

5. Respondents, **JOHN and JANE DOES, I THROUGH X**, whose true names are unknown to the Petitioners, are fictitious names; that Petitioners are ignorant of the true names of the individuals so designated by said fictitious names, and when the true names are discovered, Petitioners will ask leave to amend this Complaint and proceedings herein to substitute the true names of said Respondents. Petitioners believe that each of the Respondents designated herein as a **DOE** is responsible in some manner for the events herein referred to and intentionally, recklessly, willfully and wantonly and in a manner which was intentional, willful, reckless and wanton caused damage proximately to the Petitioners as herein alleged.

6. Respondents, with the intent of depriving the Petitioners of their political rights as well as their civil rights guaranteed by the **REDDING RANCHERIA CONSTITUTION** and the **ICRA**, have cancelled and/or vacated any meeting of the general membership of the **REDDING RANCHERIA TRIBE**, including a General Council meeting that had previously been set for May, 27, 2003, at which General Council meeting, the Resolution can be discussed, modified or wholly abrogated

7. The **REDDING RANCHERIA TRIBE of INDIANS**, in any disenrollment action, has the burden of proof and such burden is required by the Due Process guaranteed by its own **REDDING RANCHERIA CONSTITUTION** and the **ICRA**.

8. Rules of evidence regarding issues of pedigree have been developed by courts and legal scholars over the course of several centuries. Well reasoned and necessary exceptions to rules which normally exclude hearsay in other controversies have been utilized and accepted because those rules and the exceptions to hearsay now universally accepted in other courts in issues regarding pedigree are now and have been, at all times relevant to this controversy, found necessary and useful in establishing historical truth. As such, the rules and exceptions developed by the common law and by statute in the State of California and others of the United States, embody important substantive and procedural Due Process rights protected by the **REDDING RANCHERIA CONSTITUTION** and the **ICRA.**

9. The subject Resolution, passed on April 8, 2003, fails to provide the Due Process of Law or the Equal Protection of the Laws guaranteed by both the **REDDING RANCHERIA CONSTITUTION** and the **INDIAN CIVIL RIGHTS ACT**, 25 U.S.C.A. 1301 et seq., **(ICRA)**.

10. The proposed disenrollments of Petitioners, present members of the **REDDING RANCHERIA TRIBE** are also prohibited *ex post facto* laws.

11. The proposed disenrollments of Petitioners, present members of the **REDDING RANCHERIA TRIBE** are also prohibited Bills of Attainder.

WHEREFORE, PLAINTIFFS request this Honorable Court:

1. That an Alternative Writ of Mandate and Prohibition be issued, enforcing the **REDDING RANCHERIA CONSTITUTION.**

2. That an Alternative Writ of Mandate and Prohibition be issued, prohibiting the Respondents, **TRACY EDWARDS,** Chairperson, individually, and in her official capacity as Chairperson of the Redding Rancheria, a Federally recognized Indian Tribe, **HOPE WILKES,** individually, and in her official capacity as Vice-chairperson of the Redding Rancheria, **JACK POTTER,** individually, and in his official capacity as Secretary of the Redding Rancheria, **LEON BENNER,** individually, and in his official capacity as Treasurer of the Redding Rancheria, **DEBBIE SAROT,** in her official capacity as a Member of the Redding Rancheria Tribal Council, **VIRGIL BAKER**, Sr. individually, and in his official capacity as a Member of the Redding Rancheria Tribal Council, **RICHARD BURNS,** individually, and in his official capacity as an alternate Member of the Redding Rancheria Tribal Council, **PATTY SPAULDING,** individually, and in her official capacity as an alternate Member of the Redding Rancheria Tribal Council, from committing, undertaking, permitting enforcing authorizing, maintaining or adopting any policies, procedures, practices or acts in violation of the Petitioner's Tribal Constitutional Rights and rights protected by the **ICRA.**

3. That Respondents, **TRACY EDWARDS,** Chairperson, individually, and in her official capacity as Chairperson of the Redding Rancheria, a

Federally recognized Indian Tribe, **HOPE WILKES,** individually, and in her official capacity as Vice-chairperson of the Redding Rancheria, **JACK POTTER,** individually, and in his official capacity as Secretary of the Redding Rancheria, **LEON BENNER,** individually, and in his official capacity as Treasurer of the Redding Rancheria, **DEBBIE SAROT,** in her official capacity as a Member of the Redding Rancheria Tribal Council, **BOB FOREMAN**, in his official capacity as a member of the Redding Rancheria Tribal Council, **VIRGIL BAKER**, Sr. individually, and in his official capacity as a Member of the Redding Rancheria Tribal Council, **RICHARD BURNS**, individually, and in his official capacity as an alternate Member of the Redding Rancheria Tribal Council, **PATTY SPAULDING,** individually, and in her official capacity as an alternate Member of the Redding Rancheria Tribal Council, and those acting in concert with them, recognize, follow and comply with the mandate of the United States Supreme Court and the plenary power of Congress of the United States of America conferring jurisdiction on this Court to enforce the Tribal Constitutional Rights of these Petitioners against actions by elected and appointed officers and agents of their own Tribe. **Santa Clara Pueblo v. Martinez**, 436 U.S. 49, at 66, requires a court having jurisdiction over Tribal members to apply the **ICRA** and their own Tribal Constitutional guarantees

4. That said Respondents be directed and required to show cause before this Court at a specified time and place why they should not be absolutely and forever restrained from taking any further proceedings against or making any other

Resolutions affecting Petitioners herein in the above described proceedings.

5. That the Court order as well such other and further relief to which Petitioners may be entitled as may be just and proper in the circumstances.

Dated this 18TH day of June, 2003.

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VERIFICATION

I, LORENA ACKERMAN, is one of the Petitioners in the above-entitled action. I have read the foregoing PETITION, and knows the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct at Redding, California.

Dated: June 18, 2003

s\LORENA ACKERMAN

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

On April 8, 2003, the Tribal Council of the **REDDING RANCHERIA**, by a vote of 4-3 enacted Tribal Council Resolution 014-04-01-03 purporting to Establish Procedures for Conducting Hearings on a Recommendation by the Enrollment Committee to reconsider Enrollment of a Tribal Member. Exhibit "A," attached hereto. As will be shown, the "procedures" have been designed and are intended to deprive individual Tribal members, such as the Petitioners, of the Due Process of Law guaranteed both by the **ICRA** and by the **REDDING RANCHERIA CONSTITUTION.**

Respondents, a faction of the Tribal Council, seek the termination of Petitioners, descendants of the Foreman family, on the basis of a bold and implausible theory that their ancestor, grandmother or great-grandmother, to Petitioners and other interested Tribal members, **VIRGINIA TIMMONS**, had no children. It is anticipated that if the

terminators are successful with such a theory with the first wave of such disenrollments, that further disenrollment actions will follow.

Three descendants of **VIRGINIA TIMMONS** currently are members of the Tribal Council. One of those Tribal Council members, **TRACY LEROY**, is among the first group to be targeted for disenrollment.

The Tribe sent, by U.S. Mail, on Wednesday, May 21, 2003, just before the Memorial Day weekend, Notices of Hearing to the above named Petitioners. The Resolution provides that service by the Tribe on any member is deemed served on the earlier of the actual receipt by the member, or **forty-eight hours** after deposit in regular U.S. Mail or **forty-eight hours** after deposit in the U.S. Mail as a certified letter, return receipt requested, or a registered letter. The Notices of Hearing (e.g. Notice to Lorena Ackerman, Exhibit "B"), do not provide notice of any witness or any document relied upon by the Tribe or to be explained or rebutted by any Petitioner. The Resolution provides that such notice may be given to not less than fifteen days prior to the hearing and that a Petitioner must then provide the Chairman of the Enrollment Committee a copy of any documents the Member intends to offer at the hearing and the names and telephone numbers of any witnesses the Member expects to call within five days of that service.

Practitioners and parties would be sorely tried to comply with such an onerous schedule in the case of a typical fresh motor vehicle collision. The Tribe and its cooperating accusers have spent months, possibly years, in compiling theories and, purportedly, documents and witnesses, to

which the Petitioners must not only receive, investigate and respond, with any relevant documents, within five to seven days of the **hour** that the document or notice was deposited for mailing. In matters of pedigree, stretching back decades into the early part of the last century, to require such an effort and such a procedure on such a schedule, can only be designed and intended to prevent the discovery and the presentation of the truth.

LAW

The Resolution passed by a bare majority of the presently constituted Redding Rancheria Tribal Council sets up procedures giving unfettered discretion to a yet to be named hearing officer and to, again, a bare majority of a Tribal Council, without ensuring that either the hearing officer or the Tribal Council will follow any established or discernable rules of evidence, rights guaranteed by the **REDDING RANCHERIA CONSTITUTION** or the **INDIAN CIVIL RIGHTS ACT**. The Resolution, and its supporters, claim to be concerned about providing Due Process. In actuality, those supporters intend to provide only a bare illusion of Due Process to those members of the Tribe whose lineage and membership is now belatedly questioned. This Court is required to determine whether the process offered is the process which is due to these Petitioners, targets of, at best, ignorance, at worst, greed and malice, by a group of fellow Tribal members who hold a temporary and bare majority in the present Council .

It is sometimes necessary, and it is necessary here, to return to and to examine basic principles, in

determining whether a procedure provides the process which is due and necessary. This Court may look to the history and reasoning set forth by the United States Supreme Court in a series of cases examining the concept of Due Process.

THE SNIADACH FOUR

In **Connecticut v. Doehr**, 501 U.S. 1 (1991), the United States Supreme Court addressed a group of four cases that established the procedural Due Process framework for prejudgment remedies, cases that had been decided within six years of each other , from 1969 to 1975.

Prejudgment remedies presented a good model for the consideration of the requirements for Due Process. Certainly the deprivation of heritage and ancestry deserve as much attention as may be given to the repossession of an appliance by a creditor. The four cases examined by the Supreme Court are: **Sniadach v. Family Finance Corp. of Bayview**, 395 U.S.337 (1969); **Fuentes v. Shevin**, 407 U.S. 67 (1972); **Mitchell v. W.T. Grant Co.,** 416 U.S. 600) (1974) and **North Georgia Finishing, Inc. v. DiChem, Inc**. 419 U.S. 601 (1975).

Sniadach, the first in the line of cases, and probably the easiest to explicate, invalidated a state garnishment statute that failed to provide any prior notice and hearing to the garnished wage earner.

The next two cases appeared to contradict each other at the time. **Fuentes** extended **Sniadach** to require pre-deprivation process for repossession of consumer goods. Then, two years later, in **Mitchell**, the Court upheld a repossession statute because of the alternative safeguards it

provided. Many, including some members of the Court, suggested that **Fuentes** had, in fact, been overruled.

But then the Supreme Court decided **North Georgia Finishing.** The Court explicitly relied upon **Fuentes** as precedent as it invalidated *ex parte* garnishment of a corporate bank account to recover the purchase price of goods.

In 1991, the Supreme Court returned with **Doehr**, explicating its due process analysis. The Court applied a balancing test adapted from its entitlement cases and set forth in **Mathews v. Eldridge,** 427 U.S. 319 at 334 (1976) which had observed that "...due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."

The **Mathews-Doehr** test balances three factors: first, consideration of the private interest that will be affected (here, the interest of the prospectively disenrolled members in their heritage and membership in the Tribe and their share of the Tribal income); second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; (here the risk of erroneous deprivation is substantial and alternative safeguards already in place in the Constitution of the Tribe and in the ICRA have been ignored) and third, in contrast to **Mathews**, attention to the interest of the party seeking a prejudgment remedy with due regard for any anciliary interest the government may have in providing the procedure or foregoing the added burden of greater protections. (This modification was intended to

accommodate situations, such as presented in **Doehr**, in which a private party is seeking a pre-hearing remedy).

BURDEN OF PROOF

The most burdensome and outrageous provision of the challenged Resolution is the shift of the burden of proof from the accuser or the Tribe to the prospectively disenrolled member.

That provision, at III B. 2. of the Resolution states:

> **The Member has the burden of proof. That burden is to show by a preponderance of the evidence that he or she meets all of the requirements for tribal membership.**

This shift in the burden of proof is so radical that counsel have found no other instance in which it has been expressly articulated by any tribe in formulating rules or procedures concerning enrollment issues. Such a burden directly defies the Due Process guarantees of the **REDDING RANCHERIA CONSTITUTION** and the **ICRA**.

The Ninth Circuit, in **Greene v. Babbitt**, 64 F.3d 1266 (9th Cir. 1995), addressed the converse situation, in which criteria for tribal recognition by Congress had been restricted *prior* to the federal recognition of a group of Indians seeking recognition as a tribe;

> The government points out that the Samish, as a group, having never enjoyed tribal recognition, have no

> entitlement to it. The government also correctly points out that Congress is free to change eligibility criteria for federal benefits in the course of the normal legislative process. Congress need not provide due process for individuals before it changes the law, and is free to tighten eligibility requirements. See Atkins v. Parker, 472 U.S. 115, 129, 86 L. Ed. 2d 81, 105 S. Ct. 2520 (1985). There is a difference "between losing what one has and not getting what one wants." Henry J. Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1296 (1965).

Here, the Petitioners are faced with losing what they have. They have been and are members of the Redding Rancheria. Some of them are members of the Tribal Council. The actions of the Respondents, presently enjoying a bare majority in that Council, in seeking to shift the burden of proof, denies substantive and procedural Due Process of Law to Petitioners in violation of the **REDDING RANCHERIA CONSTITUTION** and the **ICRA.**

RULES OF EVIDENCE

The Resolution enacted by Respondents by their presently existing bare majority, substantially changes the application of rules of evidence, as have been applied in cases in which pedigree is in issue. III B. 4. of the Resolution states: "The rules of evidence do not apply." The resolution then goes into some detail about the types of hearsay which are admissible, and for what purposes, "...**if contained in certified copies** of birth or death certificates or other public records routinely used to determine parentage or other facts essential to an enrollment decision." (emphasis supplied)

Such a rule, rather than liberalizing rules of evidence as is commonly and routinely done in various administrative proceedings, restricts the types of evidence used in Courts for decades and centuries in determining contested issues of pedigree. There are many varieties and types of hearsay which have been necessarily and regularly relied upon by courts to establish pedigree.

As was observed by the California Supreme Court, in **The Matter Of The Estate Of James L. Flood, Deceased, v. Protestant Episcopal Bishop Of California.** 217 Cal. 763, 21 P.2d 579 (1933), in which the paternity of the decedent was in issue, and in which numerous hearsay statements and observations of behaviors were admitted and considered by the court to establish the challenged paternity, the California Supreme Court stated:

No attack was made upon the admissibility of this evidence, and the competency of such acts or declarations concerning family history (pedigree) is clearly established by statute and case law in this state. Section 1870, subdivision 4, of the Code of Civil Procedure makes admissible "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person . . ." Section 1852 of the same code provides: "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Section 1870, subdivision 11, provides that " common reputation existing previous to the controversy" is

admissible in cases of
pedigree. 217 Cal. At 776

In the instant case, Petitioners are now asked by their challengers to establish, solely on the basis of certified copes of public records dating back into the early part of the last century, the now contested maternity of their grandmother, **VIRGINIA TIMMONS.** They are precluded, by the too clever restriction of the rules of evidence, from presenting the sorts of evidence used and sought by tribunals interested in obtaining the truth for decades and centuries preceding this manufactured controversy by the Respondents.

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APPENDIX F

FORT PECK TRIBAL COURT OF APPEALS
FORT PECK INDIAN RESERVATION
ASSINIBOINE AND SIOUX TRIBES
POPLAR, MONTANA

Ft Peck Sioux Council,
Plaintiff/Appellee.

vs. **Appeal No. 370**

Ft Peck Tribes,
Defendant/Appellant.

****

OPINION AND ORDER

****

This matter arises from an **Order of Dismissal** issued from the bench by the **Honorable Chief Judge A. T. Stafne**, on **March 14, 2001.** This review is limited to the singular issue: **"Whether the Fort Peck Tribes enjoy sovereign immunity when a provision of the Tribal Code is challenged as unconstitutional."** We answer the question in the negative.

Appearances:
Reed Peyton Chambers, Esq., SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY of Washington, D.C. and **Robert L. McAnally, Esq.**, (argued) of Poplar, MT., on behalf of appellee.
Melissa G. Buckles, Lay Advocate, of Wolf Point, MT., on behalf of appellant.

BRIEF FACTUAL OVERVIEW AND PROCEDURAL HISTORY

Various officers of the appellant filed three separate **Petitions for Order to Restrain** on **April 24, 2000**, requesting that the Fort Peck Tribal Court restrain various City, County, State and Tribal officials from 'entering into any and all Cooperative Agreements that would provide Cross Deputization of Law Enforcement Officers on the Fort Peck Assiniboine and Sioux Indian Reservation' based upon allegations that such agreement(s) were scheduled to be signed at 11:00 a.m. on **April 26, 2000**, and further, that such agreement(s), if entered into, would subject Tribal members and other Indian persons to the jurisdiction of non-Indian law enforcement entities. Appellants concluded that such subjection would "affect the individual civil rights and treaty rights" of all Indians within the boundaries of the Fort Peck Tribes. All three petitions were filed with the Tribal Court without proof of service on any of the adverse parties.

The Tribal Court denied the petitions based upon **Title VIII CCOJ [Comprehensive Code of Justice] 2000 §401(a) 1** which prohibits the Court from issuing Temporary Restraining Orders or any injunction against the Tribes, or one of their officials acting on behalf of the Tribes, without prior notice. The Tribal Court also based its denials upon a failure of appellants to show "specific facts...by oral testimony, affidavit, or by verified complaint that immediate and irreparable injury

will result" in that "(a)ll Indians who reside on the Fort Peck Indian Reservation are already subject to the

arrest by non-tribal law enforcement officers in certain situations". We assumed the Tribal Court was making reference to **Title III CCOJ 2000 §208** 2 which clearly authorizes the Tribal Executive Board to grant to "all law enforcement officials vested with general law enforcement authority by the State of Montana, or by any County or City within the boundaries of the Fort Peck Reservation..." to arrest Indians within the exterior boundaries of the Fort Peck Reservation under certain conditions.

In its petitions, appellant alleges, "There is no foundation in fact or law enacted by treaty, constitutional provision or otherwise which authorizes the Defendants to subject tribal members or other Indian persons, residing within the exterior boundaries of the Fort Peck Indian Reservation, to the jurisdiction of non-Indian law enforcement entities". Appellant petitioned this Court and in **Fort Peck Sioux General Council vs Fort Peck Tribes, FPCOA #350 (2000)** we observed: "It must be assumed that appellants are either unaware of **§208** or they are, by implication, challenging its constitutionality. If appellants were to formally challenge the constitutionality of **§208**, they must do so with a great deal more precision. While such a challenge would afford them the opportunity to be heard, it should be noted that any preliminary injunction pending the outcome of the challenge must meet the standard set forth in **§402** 3, which is essentially the same standard set forth in **§ 401(a)**".

In **#350** we upheld the Tribal Court denials noting after a careful reading of all three petitions "that appellants were not requesting Temporary Restraining Orders, but

rather, permanent restraining orders". However, the fact that appellants filed their petitions, giving the Tribal Court only two days to act before the actions sought to be restrained were to take place, coupled with the fact that the Petitions were filed without proof of notice to the opposing parties, easily gives the impression that appellants were asking the Tribal Court to act without conducting a hearing. Such action would have been in violation of §401(a), cited above.

Following the denial of their petitions in **#350**, appellants filed a complaint on April 25, 2000, seeking declaratory relief, challenging the constitutionality of **§208** and moving for a preliminary injunction and emergency hearing 4. On April 26, 2000, the Tribal Court, without comment, denied appellants' motion for injunctive relief. In **Fort Peck Sioux General Council v. Fort Peck Tribes, FPCOA #354 (2000)** we held that injunctive relief was governed by **§402** and inasmuch as the Tribal Court denied appellants' motion without comment, it was impossible for this Court to review the denial for error. We then remanded the matter to the Tribal Court with instructions to either: 1) Set a hearing date for the preliminary injunction and issue its findings and order thereafter, or, alternatively, 2) Issue an order without granting a hearing, setting forth in the order the legal basis and rationale for the Court's order.

On March 14, 2001, the Tribal Court heard appellants' petition for preliminary injunction, motion to appoint

Special Judge and appellee's motion to dismiss. In dismissing appellant's action, the Tribal Court cited **Title II CCOJ 2000 §110** as controlling. **§110** states: "The Tribes shall be immune from suit. Nothing in the

Code shall be construed as consent of the Tribes to be sued." The Tribal Court also cited a number of federal cases as well as this Court's **Reddoor v. Wetsit, FPCOA #095 (1990)** in support of its denial. We granted appellants' petition for review on May 9, 2001, limiting our review to the singular issue **"Whether the Fort Peck Tribes enjoy sovereign immunity when a provision of the Tribal Code is challenged as unconstitutional."** We heard oral argument on November 2, 2001, and the matter was submitted.

STANDARD OF REVIEW

Whether the Fort Peck Tribes enjoy sovereign immunity is a question of law which we review de novo. **Title II CCOJ 2000 §202**.

DISCUSSION

At the heart of the issue before us is whether the plain language of **§110** bars a suit against the Tribes even when the constitutionality of their actions is questioned. In **DeCoteau v. Fort Peck Tribes, FPCOA #363 (2003)**, we recently held that **§110** barred suits against the Tribes under **25 U.S.C. §1302**, nothing that the Tribes provided a remedial avenue of redress for such grievances under **Title II CCOJ 2000 §111**. We also noted that in **Title II CCOJ 2000 §113** 5 the Tribes expressly waived their immunity for judicial review of

certain administrative decisions. However, neither **§111** nor **§113** address the issue before us. Appellants argue that the purpose of sovereign immunity is to protect the entire membership, as a whole, rather than a few selected individuals elected to office, and when the "constitutional and civil rights"

have been violated there must be available to them a forum for redress. Appellants maintain that the intent of **§1302** is to protect tribal members and others within Indian Country from the abuse of power by Tribal Governments and that "(t)o say that the Tribes and its elected officials cannot be sued creates chaos, discontent (and) an atmosphere ripe for abuse of power and authority ...creat(ing) a class of individuals that become simply...above the law." (See Appellants' Notice of Intent and Supportive Statement filed May 29, 2001, at page 2.) We addressed and resolved most of appellants' concerns in **DeCoteau**. However, the specific issue of whether the Tribes enjoy sovereign immunity when one or more of its duly enacted code provisions are attacked as unconstitutional is an issue of first impression in this Court 6.

The Tribes argue that the Tribal Court's dismissal should be affirmed by this Court "because this case does not present a plausible claim that the Tribes' constitution has been violated". The Tribal Court did not address whether, as a matter of law, appellant presented a plausible claim or whether **§208** was unconstitutional. We limited review in this matter to the issue of sovereign immunity because it was the only issue ruled upon by the Tribal Court.

The Tribes also argue, "in any event (the Tribes) are immune from a suit challenging the constitutionality of a tribal code provision". The Tribes cite **§110** as the controlling authority. In addition to **§110**, the Tribes cite **Reddoor**, supra, in support of its position. In **Reddoor** we held that the Election Commission's execution of its duties pursuant to **Title XIV CCOJ §111(l) (now Title V CCOJ 2000 §111(i))** was not subject to judicial review. Stated simply, the primary issue resolved in Reddoor was to keep the Tribal Court out of the business of deciding election contests, thus we find no support in **Reddoor** for appellee's argument here. Before examining **§110**, we turn to the federal cases cited by the Tribes.

The Tribes cite a line of federal cases headed by the landmark decision in **Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)** holding that Tribal Governments enjoy sovereign immunity in the absence of an express consent to be sued or an express waiver by the U.S. Congress. We dealt extensively with this issue in **DeCoteau,** stating:

> "However, we need go no further than **Santa Clara Pueblo** to determine whether Indian Tribes and their elected officials, employees and agents, enjoy sovereign immunity from civil suits pursuant to ICRA. With the exception of habeas corpus, which is not in issue here, the answer

with reference to federal courts is in the affirmative and as to Tribal Courts it is in the negative. In short, we believe that federal common law prohibits federal court jurisdiction for civil suits

against Indian Tribes and their officials, employees and agents, while encouraging and designating the tribal courts as the most appropriate forum for lawsuits under ICRA." (**DeCoteau** @ pages 5-6)

We note that not all suits attacking the constitutionality of a code provision necessarily fall within the purview of §1302. Nonetheless, the Tribes have not cited, nor are we aware of, any controlling federal case which holds that an Indian government enjoys sovereign immunity in a Tribal Court when one of its laws are attacked as unconstitutional. On the contrary, we believe a strong argument can be made that federal courts take the opposite view. In addressing the issue with respect to ICRA, the U.S. Supreme Court in Santa Clara Pueblo observed:

"Tribal forums are available to vindicate rights created

> by the ICRA, and §1302 has the substantial and intended effect of changing the law **which these forums are obliged to apply.** 7" (US @ 65, Our emphasis)

Regarding tribal sovereign immunity and federal case law, we restate our holding in **DeCoteau** here: The Fort

Peck Tribes and their officers, employees and agents enjoy sovereign immunity in the federal courts. As to jurisdiction of our Tribal Court, officers, employees and agents of the Fort Peck Tribes enjoy limited sovereign immunity pursuant to **§111** and, subject to the consensual review of certain administrative decisions pursuant to **§113**, the Fort Peck Tribes enjoy sovereign immunity.

The plain language in **§110**. In **DeCoteau** we stated that the language of **§110** was "straight forward and definite...(and) (a)s such, ...needs no interpretation from this Court". We agree with the Tribes that "(t)he section is absolute" and that "it does not say 'except if a constitutional violation is claimed". Nonetheless, the case sub-judice presents such an important and sensitive question of law we would be remiss to leave the matter without a thorough examination of the purpose and benefits of sovereign immunity; the potential adverse consequences of a government that enjoys 'absolute sovereign immunity' and this Court's duty and role in determining the law.

Purpose of sovereign immunity. The doctrine of sovereign immunity finds its genesis in the basic root of

English common law. Its initial underpinnings were based on adages such as, "'the sovereign can do no wrong' " or "the law giver cannot be made subject to a lawsuit". Far more compelling rationales are advanced today: "Preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sover gn entities." **Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743, 122 S.Ct 1864,1874**

(2002); "The rationale for sovereign immunity essentially boils down to substantial bothersome interference with the operation of government." **Littell v. Morton 445 F.2d 1207 C.A.Md. (1971)**. In their excellent brief the Fort Peck Tribes offer compelling rationale for tribal sovereign immunity: "Sovereign immunity protects tribes against unconsented lawsuits that would drain tribal treasuries, interfere with tribal government operations, and handicap the tribe's ability to provide much-needed services to its people". (id. @page 2)

We are in total agreement. There is no doubt that the doctrine of sovereign immunity is the singular most important issue facing all Indian governments today.

Benefits of sovereign immunity. As applied to Tribal governments, the summary of cited rationales, supra, provide an array of benefits that accrue from sovereign immunity. Tribes are afforded the dignity consistent with sovereign entities; they are protected from unconsented lawsuits which drain their treasuries, interfere with daily governmental operations and handicap their ability to provide necessary services to their people. In short, sovereign immunity allows tribal

governments to take their limited resources and run a more efficient, effective and productive entity; all of which ultimately inures to the benefit of its people. Recognizing the great need for services on Indian Reservations there should be no one unmindful of the importance of sovereign immunity, without which Tribal governments would be severely handicapped if not incapacitated.

Thus, when the invocation of sovereign immunity advances the benefits of its purpose and rationale we will continue to strongly support the doctrine. Further, it is our belief that our Tribal Council enacted **§110** with these benefits in full view. However, we also believe that our Tribal Council did not contemplate any adverse effects that might be visited upon its people by virtue of the doctrine.

Adverse effects of 'absolute' sovereign immunity. Sovereign immunity presupposes that the government, their agencies, and/or officers acting thereunder, do so within the scope of their duties. In other words, sovereign immunity does not shield wrongdoing. As an example, who stands for the proposition that tribal governments can take property from its members or others within their jurisdiction in violation of its constitution or without statutory authority? Who supports a government that enacts laws contrary to the will of the people as expressed in its constitution? Who then will advocate the notion that it is fair and just for one to have a right but their only remedy is barred by sovereign immunity? In 1803 Chief Justice Marshall posed a similar question:

"If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to

afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."
Marbury v. Madison, 5 U.S. 137, 162-163

The authority given to those fine people who we elect and appoint to powerful positions understand that their authority is not vested by divine right, but rather, it is the people who elected or appointed them and it is that same electorate who created this government with a constitution granting limited power to their leaders and it is within that framework, and that framework only, they have consented to be governed.
Thus, we come to the critical question before us: Does the defense of sovereign immunity advance its purposes and rationale when invoked against a claim that challenges the constitutionality of a provision in the Comprehensive Code of Justice (2000)? We think not. We see no benefit flowing from sovereign immunity

when it does nothing more than shield an inquiry into whether a provision of existing law passes constitutional muster. Such invocation does nothing more than take a doctrine intended for the people's protection and use it as a weapon of deprivation. Neither our Tribal Council nor this Court can condone such misuse. We are confident that our Tribal Council shares our belief that a government can only be as strong as its will to treat its people righteously.

Thus, we hold that **§110** does not bar claims against the Fort Peck Tribes when one of the provisions of the CCOJ 2000 is challenged as unconstitutional.

Duty of the Fort Peck Tribal Court system. We are acutely aware of those who will question this Court's authority in this matter. However, we do not see it as a matter of authority, but rather, as a matter of duty. The Fort Peck Tribes is a constitutional government, created by the people of the Assiniboine and Sioux Nation. The original creative will of the people is expressed in a written constitution that in turn authorizes our Tribal Council to organize and assign responsibilities and duties to various branches of government. These powers and responsibilities are defined and therefore limited. If so limited, the question arises: What happens if the limited power and authority thus given is transcended? And, who will decide such an occurrence? To answer the first question we turn again to Chief Justice Marshall:

> "The question, whether an act, repugnant to the constitution, can become

the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it."

(After a discussion of limited and 'illimited' governments and holding that the United States was a limited government, he continues...)

"...If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity

too gross to be insisted on. It shall, however, receive a more attentive consideration." **(Marbury @page 177)**

Chief Justice Marshall goes on to answer the second question of 'who' will decide:

"It is emphatically the province and duty of the judicial department to say

what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

"So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the

> court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." (Marbury @pages 177-178)

The **Marbury decision** has been referred to as "the fountainhead of American jurisprudence 8" and for 200 years it has formed the foundation of judicial review. The doctrine is well entrenched in the federal courts as well as all state jurisdictions. Many notable tribes have also adopted the doctrine in Indian Country. (**Halona v MacDonald, 1 Nav. R. 189, 204-206 (1978)** (held: **Actions of Navajo Tribal Council reviewable by Tribal Court**); **Satiacum v. Sterud, No. 82-1157 [Puyallup 04/23/1982]** (held: **Actions of Puyallup Tribal Council reviewable by Tribal Court**); Hunter v. Holder 2 Okla. Trib. 187 Delaware.CIO,1991 (held: Election Board acted ultra vires, 'stripped' of sovereign immunity); **Apache Election Bd. v. Wildes, 2 Okla. Trib. 136 Apache.CIA,1990** held: Election Board did not enjoy sovereign immunity when their actions are unconstitutional)).

The primary and sole function of our Tribal Court system is to define and interpret the law of this land and to insure that the rights and privileges of those who come before it are properly preserved. We do not seek to intermeddle or obfuscate the operations of our legislative and executive officers, nor do we seek to 'second guess' their decision making process. We are in total agreement with Chief Justice Marshall's comment on judicial usurpation:

> "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." **(Marbury @page 170.)**

Yet, we are not unmindful that our actions herein have looked squarely into the face of plain, simple and straightforward words of our Tribal Council and we have set them aside in a singular, narrow instance. We have not done so lightly. The law and the intent of our Tribal Council has ever been our guide. However, to say that we do not believe our Tribal Council intended the result of their plain words would be absurdly

presumptuous. Nonetheless, we have a 43-year history of Tribal Council actions from which to draw and a review of those actions shows no evidence of their desire to deprive their people of any rightful and proper redress. As to the present opposition to appellant's claim it must be noted that all governments seek to vindicate existing laws, allowing the courts of the land to determine what is and what is not constitutionally repugnant. And, that is precisely the process we have undertaken herein.

IT IS NOW THEREFOR THE ORDER OF THIS COURT THAT:

The matter is remanded to the Tribal Court for further proceedings consistent with the opinion herein.

Dated this 7th day of April 2003.

FOR THE FORT PECK COURT OF APPEALS

BY_____

Gary P. Sullivan
Chief Justice

CONCUR:

_____

Gerard M. Schuster Associate Justice

1 Title VIII CCOJ §401(a) (formerly Title IV §401(a)) reads:

"Sec. 401. Temporary restraining orders without notice.

(a) No temporary restraining order or other injunction without notice shall be granted where the Tribe is a defendant or a tribal official is a defendant in his/her official capacity. Otherwise, except as provided in subsection (c), no temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by oral testimony, affidavit or by the verified complaint that immediate and irreparable injury will result to the applicant before notice can be served and a hearing had thereon..."

2 Title III CCOJ 2000 §208 states:

Sec. 208. State and local law enforcement officials authorized to make arrests.

(a) All law enforcement officials vested with general law enforcement authority by the State of Montana, or by any County or City within the boundaries of the Fort Peck Reservation and approved by Executive Board on recommendation of the safety committee, are hereby authorized to arrest Indians on any highway on the Reservation or within the boundaries of the cities of the Reservation for violations of the Tribal Code of Justice. Each jurisdiction shall from time to time submit the names of new law enforcement officials to the safety committee for approval.

(b) Upon arresting any Indian as authorized by this Section, such law enforcement officials shall promptly deliver the individual to the Tribal Court or to the appropriate tribal law enforcement officers for action under tribal laws.

3 Title VIII CCOJ §402 states:

Sec. 402. Preliminary injunctions.

A preliminary injunction restrains activities of a defendant until the

case can be determined on the merits. No preliminary injunction shall be issued without notice to the adverse party and an opportunity to be heard, and no preliminary injunction shall be issued absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued, that the applicant has a high likelihood of success on the merits, and that the balance of equities favors the applicant over the party sought to be enjoined. The Court may dissolve or modify a preliminary injunction at any time as the interests of justice require.

4 The Tribal Executive Board was to enter into an agreement with various Montana State, County and City officials which would, for the first time in the history of the Fort Peck Reservation, grant full reciprocity to the Tribes in terms of arrest authority. The ceremonial signing of that agreement was to take place on April 26, 2000.

5 Sec. 113. Review of administrative decisions.

(a) The Court shall have exclusive jurisdiction over all appeal from actions by agencies or offices of the Tribes, where such appeals are authorized by this Code.

(b) Notwithstanding Section 110 of this Title, the Tribes hereby waive their immunity from suit in Tribal Court for appeals under subsection (a). Relief against the Tribes shall be limited to that specified in the provisions of the Code authorizing the appeal. In no event shall the Tribes be liable for money damages, except that the Tribal Court may order refunds of taxes or fees erroneously collected where such relief is specifically authorized by the provision of the Code under which the appeal is taken. Sec. 502. Issuance of subpoenas. (a) Upon request of the defendant or upon the Court's own initiative, the Court shall issue subpoenas to compel the testimony of witnesses, or the production of books, records, documents or any other physical evidence relevant to the determination of the case and not an undue burden on the person possessing the evidence. An employee of the Court may act on behalf of the Court and issue subpoenas which have been signed by a trial judge and which are to be served within the confines of

the Reservation.

6 The fac. that appellants' complaint marks the first time in the 43 year history of our Constitution that one of its provisions was challenged as unconstitutional is a tribute to the document itself as well as those past and present leaders who have faithfully carried out its provisions with excellence.

7 The quoted portion of the text makes reference to "Footnote 20" which reads:

> "FN20. Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, e. g., 1961 Hearings 121, 166, 359; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.58, 88th Cong., 1st Sess., 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See House Hearings 131 (remarks of Sen. Ervin); 114 Cong.Rec. 5520 (1968) (message from the President)."

8 Attributed to U.S. Supreme Court Justice Antonin Scalia